No. 3919.

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. P. BUTCHART and CLARK M. MOORE,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOHN S. COKE,
United States Attorney for Oregon.
LESTER W. HUMPHREYS,
Special Assistant United States Attorney for Oregon.
For Defendant in Error.

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STATEMENT.

The manufacture and sale of cement in the states of California, Oregon and Washington, until 1916, was carried on chiefly by nine companies. Sixteen of the officers of these companies are named as defendants in the indictment. The Oregon Portland Cement Company was the last to enter the field.

Prior to August, 1914, three western Washington and five California companies were in active competition. They then entered into an arrangement alloting

the territory among them. Washington companies were given the state of Washington, and shared Oregon, north of Salem, with the California companies. Oregon, south of Salem, and the state of California, became exclusively the territory of the California companies. The price of cement in Washington was fixed by the Washington companies. California companies fixed the price for Oregon and California.

Organization of the Oregon company began as early as 1909, but it did not come into the market with cement until the spring of 1916. About this time the previous arrangement was so modified that the Washington companies withdrew from Oregon, the Oregon company agreed to stay out of Washington and California, and the price of cement in Oregon was fixed by the Oregon company. The indictment was returned in October, 1916.

Of the sixteen officers who were indicted, seven entered pleas of guilty on behalf of the eight companies of which they were officers, and these seven defendants were fined. Seven other individuals were officers of the same companies as to which pleas of guilty were entered, and the indictment was dismissed as to them. When the case was called for trial, there remained only the two defendants who are plaintiffs in error here. The case was tried twice, first in October, 1919, resulting in a disagreement; and again in December, 1920, resulting in the judgment of conviction here for review.

The proof was a combination of direct evidence, letters and facts showing the course of dealing of the several companies. There was direct evidence by the defendant Coats, president of the Washington Portland Cement Company, to the effect that in July, 1914, at a conference at San Francisco, the cement

men agreed that the coast territory should be divided by giving Washington to the Washington companies and allowing them to fix their own price; allowing the Washington companies to sell in Oregon as far south as Salem, but at prices fixed by the California companies; and giving the California companies all of Oregon south of Salem, and all of California.

This was supplemented by a mass of letters, showing among other things the following: a California company notified a dealer at Aberdeen, Washington, that it could not take cement orders in Washington, but solicited the continuation of lime and plaster orders; a California company had a request from Bellingham, Washington, for quotation on cement, and in response to a telegram asking for authority to quote $2.40 per barrel, which was 10c higher than the price of the Washington mills, the California company wrote its representative:

> "As we understand that the present list price of the Washington mills is $2.30 f. o. b. Bellingham, we have telegraphed you that it is quite in order for you to quote as you desire, and if the business is received by us on this basis, we shall certainly be glad to fill it." (Ex. 117; Ex. 70. Trans. 593, 656).

The Superior (Washington) Company wrote to Balfour Guthrie at Portland as follows:

> "My understanding of the arrangement with the California companies in Oregon is that the Washington companies after the first of the year should stay north of Salem. I wish you would let me know if my understanding of this is right." (Ex. 59, Trans. 587.)

The same company wrote to its representative at Tacoma:

"Referring to our telephone conversation of this morning, in the matter of the bids for the 300 barrels required by the State Training School at Chehalis, it was agreed among ourselves that this order should come to us. We are consequently putting in a bid of $1.85½ the same as we did last time, the Washington $1.87½ and Balfour Guthrie $1.90. We would prefer that you do not bid on this at all, but if you do, kindly bid slightly above us." (Ex. 56, Trans. 583.)

Defendant Butchart since 1913 was a stockholder in the amount of $100,000 in the Washington Portland Cement Company, of which defendant Coats was president.

The building of the cement plant at Oswego, Oregon, now operated by the Oregon Portland Cement Company, was projected as early as 1909. When the plant was partially completed, building was arrested for further financing. It survived various vicissitudes, and passed through at least one reorganization, when the present company succeeded the Portland Cement Company. Defendant Butchart was financially interested in the project as early as 1910, and became a director of the present company in December, 1915.

Touching the modified arrangement of 1916, which cleared the way for the Oregon company to market its product, the evidence showed renewed conferences of the defendant cement makers. There was direct testimony by Aman Moore, who was the first sales manager of the Oregon Company, to the effect that defendant Butchart, after returning from California early in 1916, said to Moore (who is not a relative of defendant Clark M. Moore) that Butchart had conferred with Washington and California makers at San Francisco in March, 1916, and they

had agreed to limit the territory of the Oregon company, which was not to ship cement east of Umatilla. There were also letters from Butchart to Aman Moore over a period of a year prior to the time when Oregon cement came on the market, from which the following are taken:

> May 22, 1915. "Think it will be best that you arrange price with Mr. Coats, and hope price will not be too low. * * * In future would leave Mr. Nickerson severely alone, and anything of importance we can take up direct with Mr. Coats." (Ex. 85, Trans. 621.)
>
> June 14, 1915. "Our company above all others has an object in keeping prices up. There is no reason for cement selling lower at Portland than at San Francisco and Seattle, and I think I can aid in effecting this." (Ex. 86, Trans. 622.)
>
> December 29, 1915. "We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers. Unquestionably the price should be the same at Portland as at Seattle, San Francisco and Tacoma. * * * It will be difficult for us, a new company, to secure the higher price unless we are permitted to name the price at which cement is to be sold in Oregon. An understanding should be arrived at whereby we are assured of disposing of the output of a 1 kiln plant. To obtain this will require careful handling, but I am in hopes it can be done. * * * I must be in Toronto on the 10th and propose returning home by way of San Francisco toward the end of the month and if necessary will try and arrange to have some of the Washington makers meet me there, to go into the whole sub-

ject, and as I am in very close touch with some of the makers, I think it better that you leave this entirely in my hands for the present." (Ex. 88, Trans. 624.)

February 15, 1916 at Del Monte. "I hope to see Mr. Hinshaw and Mr. Coats shortly. I have arranged to go to San Francisco on the 17th. * *" (Ex. 92, Trans. 637.)

March 2, 1916 at Del Monte. "I note what you say regarding pushing sales and am quite as anxious as you that we should get busy on the sales end, but we are not ready to make any quotation to any one. Don't worry. Have you named any price for the carloads you have sold?" (Ex. 94, Trans. 638.)

March 14, 1916, at San Francisco "I can quite understand your impatience to push sales. Some of the Washington makers will be here Friday. I expect we will have something definite next week. In the meantime just as well forego any expenditures in the way you suggest." (Ex. 96, Trans. 642.)

March 31, 1916, at Los Angeles. "I learn with regret that you have recently had Mr. Hollister in Washington soliciting business for our company. This in the face of a request that you do nothing in this respect other than to advise the trade by circular letter that Oregon cement will be on the market in April.

"You assured me that you would do nothing further than this. I would ask you again to leave sales alone for a time, and I have written Mr. Newlands to confer with you regarding some other position in the works for Mr. Hollister."

(Copy of letter of same date to Mr. New-

lands): "Mr. Hollister has been doing things he should not do at Walla Walla, Washington, and Baker, LaGrande and Pendleton, Oregon, and although Mr. Moore is responsible for this, I do not see that we require Mr. Hollister's services further in connection with sales.

"If you can find anything else around the plant that he can do and make himself useful you might arrange to retain him, but if you can not do so profitably you would better ask for his resignation." (Ex. 97, Trans. 644.)

Defendant Butchart returned from California to Portland in April, 1916, and immediately Aman Moore was displaced as sales manager by defendant Clark M. Moore, who had been brought from Denver by Mr. Butchart for that purpose. This was done at the insistence of the Washington cement makers. Mr. Butchart told Aman Moore (so Moore testified) that Washington makers had complained bitterly about the soliciting of business in Washington for the Oregon company by Mr. Hollister, and insisted on Aman Moore's removal.

Aman Moore then testified that he told Clark M. Moore about the agreement dividing territory and fixing prices, and that Clark M. Moore assured the witness that he (defendant Moore) would not carry out such an arrangement. However, the business of the Oregon company was conducted by defendant Clark Moore in compliance with the arrangement. Requests from points in Washington for quotations were avoided (Ex. 80, Ex. 103), or if a quotation was made, it was only after defendant Clark Moore had telephoned his co-defendant Eden at Seattle to learn their price, (Trans. 128-131) and then quoted a price higher than the Washington makers were quoting

(Ex. 72-73), and a price ($2.68 per barrel f. o. b. Seattle) which, allowing for freight, was higher than the Oregon company was selling at in Portland.

Upon the advent of the Oregon cement upon the market, Oregon dealers were no longer able to obtain Washington cement; and the price they had to pay for Oregon cement was higher than they had previously been paying for Washington cement (Trans. 220).

In June, 1916, a suit was brought by Aman Moore in the Circuit Court of the State of Oregon in his own name and that of the Oregon Portland Cement Company, against all the companies involved in this indictment and others, as well as a number of individuals charging the existence of a combination in restraint of trade. This led to dissention in the Oregon Company, there were investigations by stockholders and directors, and feeling against Aman Moore developed in certain quarters. The defense sought to prove the findings of these investigators, and assign as error the rejection of the evidence.

Part of the strategy of the defense at the trial of this indictment was to attack Aman Moore. It was asserted by counsel for defendants Butchart and Moore that the prosecution had been instigated by Aman Moore; that he was responsible for it and assumed control over it to the extent of offering to have the indictment dismissed. This was reiterated before the jury, and to meet this contention, the government proved that the original complaint was made to the Treasury Department in February, 1915, by three dealers in Aberdeen, Washington. (Ev. p. 24, Ex. 40.) The admission of this exhibit is assigned as error and argued in appellants' brief.

The fifty-two assignments of error recited in the

brief (the transcript contains 115 assignments of error on behalf of Butchart and 77 on behalf of Clark Moore) are divided by appellants into four groups. For convenience we will follow this classification:

First: the indictment.

Second: the admission of evidence.

Third: the exclusion of evidence.

Fourth: instructions given and refused.

POINTS AND AUTHORITIES.

I.

Any combination, the necessary effect of which is to stifle or restrict free competition, is unlawful.

United States vs. Union Pacific Coal Co., 173 Fed. 737-739.

II.

The criterion whether a combination is unlawful is its effect upon interstate trade, which need not be a total suppression; it is enough if the necessary operation of the combination tends to restrain interstate commerce and to deprive the public of the advantages flowing from competition.

United States vs. McAndrews et al, 149 Fed. 823-833.

United States vs. Northern Securities Co., 193 U. S. 197-327, 331, 332.

III.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the act.

United States vs. Trans-Missouri Freight Ass'n. 166 U. S. 290-337, 341.

United States vs. Joint Traffic Ass'n. 171 U. S. 505-577.

Addyston Pipe Co. vs. United States, 175 U. S. 211-244, 245, 246.

Swift & Co. vs. United States, 196 U. S. 375-397.

Standard Oil Co. vs. United States, 221 U. S. 1-59-62.

United States vs. American Tobacco Co., 221 U. S. 106-179.

IV.

A combination apportioning the territory to be served by the defendants, eliminating competition between them, is in restraint of trade.

Addyston Pipe Co. vs. United States, 175 U. S. 211-241.

Standard Sanitary Mfg. Co. vs. United States, 226 U. S. 20-50, 51.

United States vs. International Harvester Co., 214 Fed. 987-994.

Eastern States Lumber Ass'n. vs. United States, 234 U. S. 600-610 et seq.

V.

A combination having for its purpose the fixing of prices is unlawful.

United States vs. New Departure Mfg. Co., 204 Fed. 107-110 et seq.

United States vs. Whiting, 212 Fed. 466-471, 472.

National Cotton Oil Co. vs. Texas, 197 U. S. 115-129.

Miles Medical Co. vs. Park & Sons, 220 U. S. 373-400-408.

VI.

The public is entitled to the natural and free flow of interstate commerce along its accustomed channels. Dealers may not, by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

Federal Trade Commission vs. Beech Nut Packing Co., 257 U. S. 449-453.

VII.

If defendants combine to restrain the freedom of interstate commerce, the parts of the general scheme, although lawful in themselves, become parts of an illegal combination under the Federal Statute.

United States vs. Reading Company, 226 U. S. 324-352.

Swift & Co. vs. United States, 196 U. S. 375-396.

United States vs. Rintelen, 233 Fed. 793-799.

VIII.

Few indictments are so skilfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged.

Sheridan vs. United States, 236 Fed. 305-311 (9CCA).

Ex parte Pierce 155 Fed. 653.

IX.

The test of the sufficiency of an indictment for unlawful restraint of trade is not that it might be more specific and certain, but whether it charges enough to put the defendants on notice of what they may expect to meet in the proof.

United States vs. American Naval Stores Co., 186 Fed. 593-595.

United States vs. New Departure Mfg. Co., 204 Fed. 107-111 et seq.

United States vs. Rintelen, 233 Fed. 793-795 et seq.

Burton vs. United States, 202 U. S. 344-372.

X.

Such an indictment need contain no more than a description of the method actually devised and adopted for the restraint of commerce.

United States vs. Swift, 188 Fed. 92-98.

United States vs. McAndrews et al., 149 Fed. 823-825-830.

United States vs. Patten, 226 U. S. 525-538-540.

XI.

An indictment for conspiracy to restrain interstate commerce need not set out the means by which the object of the conspiracy is to be accomplished.

United States vs. Norris, 255 Fed. 423, 424.

Boyle vs. United States, 259 Fed. 803-805.

XII.

The term "monopoly" as used in the act, includes

the suppression of competition by unification of interest. A monopoly exists even if the immediate effect is not to create a complete monopoly. It is sufficient if it tends to bring about that result. The decisive question is whether or not the power exists, not whether it has been exercised.

American Biscuit Co. vs. Klotz, 44 Fed. 721-725.

United States vs. Keystone Watch Co., 218 Fed. 504-517.

United States vs. Trans-Missouri Freight Ass'n., 166 U. S. 290-336.

Addyston Pipe Co. vs. United States, 175 U. S. 211-237.

Standard Oil Co. vs. United States, 221 U. S. 1-51-59, 61, 62.

National Cotton Oil Co. vs. Texas, 197 U. S. 115-129.

XIII.

An exception to an instruction to a jury which does not point out the particulars in which the instruction is claimed to be erroneous, furnishes no basis for reversal.

Hammond vs. United States, 246 Fed. 40-47.

Jones vs. United States, 265 Fed. 235-241.

XIV.

An accused who takes the stand in his own behalf may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is fully informed, without subjecting himself to the inferences naturally to be

drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.

Caminetti vs. United States, 242 U. S. 470-493, 494; 220 Fed. 545-548.

The Indictment

The objections to the indictment are threefold:

(a) That the facts stated do not constitute an offense.

(b) That the combination is not described.

(c) That the charge is too indefinite and vague to inform the defendants with reasonable certainty of the accusation against them.

(A) **Was the law violated?**

The first objection is that the facts stated do not constitute an offense against the laws of the United States. Let us see, briefly, what facts are stated. The indictment tells us that various companies, located in three named states, manufactured Portland cement for the general trade, and engaged in interstate commerce; that each of the companies had certain officers and agents, who are the defendants named in the indictment, and who were engaged in managing and directing the business of their several companies; that these persons have knowingly by concerted action carried on the business of their several companies without competition as to localities in Oregon, Washington and California, and by such knowing and concerted action excluded a southern California company from the cement trade in Oregon and Washington; excluded the other California companies from the cement trade in Washington; excluded the Washington companies from the cement trade in Oregon and California; excluded the Oregon company from

the cement trade in Washington and California; and required the northern California and Oregon companies to sell cement in Oregon only upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance; and that by reason thereof, consumers of cement in Oregon, Washington and California have been denied the benefits of competition between the several companies and have been required to pay for cement, prices greatly in excess of the prices at which they would have obtained cement but for the combination.

Is such a state of facts prohibited by the statute? The act is terse: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal" (26 Stat. L. 209).

The facts stated in the indictment show that the defendants have by agreement and concert of action (1) apportioned among themselves the territory of the Pacific Coast in which they engaged in interstate commerce, part of them taking the state of Washington, part taking the state of Oregon and part taking the state of California; and each group taking its portion of territory to itself and to the exclusion of the others, and (2) fixed the prices at which cement should be sold.

This is just such a situation as the Supreme Court spoke of in Addyston Pipe Co. vs. United States, 175 U. S. 211-241, when it said:

> "If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business

in that territory, would not such an agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be) the character of the agreement would be still more clearly one in restraint of trade."

If this is a combination in restraint of trade, it is illegal. It is difficult to see how such an arrangement could have any effect other than to restrain trade, and to restrain it unduly and unreasonably. If it has that effect, then the indictment states an offense against the laws of the United States.

The reported cases nowhere approve such an agreement as wholesome or lawful. It is held that any combination, the necessary effect of which is to stifle or restrict free competition, is unlawful. U. S. vs. Union Pacific Coal Co., 173 Fed. 737-739. The criterion whether any combination falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade; it is enough if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantages flowing from competition. U. S. vs. McAndrews, 149 Fed. 823-833; United States vs. Northern Securities Co., 193 U. S. 197-327, 331, 332.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the act. United States vs. Trans-Missouri Freight Ass'n., 166 U. S. 290-337-341; United States vs. Joint Traffic Ass'n., 171 U. S. 505-577; Addyston Pipe Co. vs. United States, 175 U. S. 211-244, 245, 246.

Combinations to suppress, destroy, stifle or obstruct free competition between those engaged in

interstate trade are in restraint of such interstate trade. Swift & Co. vs. United States, 196 U. S. 375-397; Standard Oil Co. vs. United States, 221 U. S. 1-59-62.

A combination apportioning the territory to be served by the defendants, eliminating competition between them, is in restraint of trade. Addyston Pipe Co. vs. United States, 175 U. S. 211-241; Standard Sanitary Mfg. Co. vs. United States, 226 U. S. 20-50, 51; United States vs. International Harvester Co., 214 Fed. 987-994; Eastern States Lumber Ass'n. vs. United States, 234 U. S. 600-610 et seq.

A combination having for its purpose the fixing of prices is unlawful. United States vs. New Departure Mfg. Co., 204 Fed. 107-110; United States vs. Whiting, 212 Fed. 466-471, 472; National Cotton Oil Co. vs. Texas, 197 U. S. 115-129; Miles Medical Co. vs. Park & Sons, 220 U. S. 373-400-408.

The situation disclosed by the indictment is this: That in the three Pacific Coast states there was interstate trade in cement, practically all of which was carried on by the defendants as officers and agents in the direction and control of their several concerns; that by the combination among them the cement trade in California, which was of interstate character, ceased to be interstate trade and became intrastate trade; the cement trade in Washington similarly lost its interstate character and became intrastate trade; and the interstate cement trade in Oregon lost so much of its interstate quality as was derived from the participation therein of the Washington and southern California cement makers, while so much of interstate quality as remained to it was further restrained in its functioning by arbitrary and preagreed prices.

An indictment is not a mysterious document. No clairvoyant ability is required to read it. It is to be accepted as meaning what it fairly conveys to a dispassionate reader by a fairly exact use of English speech.

The public is entitled to the natural and free flow of interstate commerce along its accustomed channels. The buying public and all persons engaged in trade are entitled to the free opportunity to every dealer of approaching each and every prospective purchaser on equal terms, with the chance of making a sale if the dealer can persuade the purchaser to buy. When part of the dealers have by a combination been driven from their accustomed field, so that the remaining dealers have that field to themselves; and when that field is one where interstate commerce existed, and by the combination that interstate commerce has ceased to exist or has been largely diminished; then the law has been violated. We believe that the dispassionate reader, on the level of fairly exact use of English, will learn from reading the indictment that it states an offense against the Sherman Act.

In the case of Federal Trade Commission vs. Beech Nut Packing Company, 257 U. S. 449-453; 66 L. Ed. 307-313, the Supreme Court said:

> "It is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural

flow of commerce in the channels of interstate trade."

Defendants are not entitled to insist upon isolating a part of the indictment from its other parts, and separately considering the isolated part to determine whether therein is expressed a violation of the law. United States vs. Patten, 226 U. S. 525-544. If the entire instrument, taken together, considering each part in its proper relation to all the other parts, disclosed an offense, it is sufficient. In United States vs. Reading Company, 226 U. S. 324-352; 57 L. Ed. 243-252, it is said:

> "But if the defendant carriers did * * * combine to restrain the freedom of interstate commerce * * * the parts of the general scheme, however lawful, considered alone, become parts of an illegal combination under the Federal Statute * * * * * *"

(B) Describing the Combination.

It is argued that the indictment is bad for failure to give particulars of the unlawful combination.

The test of the sufficiency of such an indictment is not that it might be more specific and certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. United States vs. American Naval Stores Co., 186 Fed. 593-595; United States vs. New Departure Mfg. Co., 204 Fed. 107-111; United States vs. Rintelen, 233 Fed. 793-795. Few indictments are so skilfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense in-

tended to be charged. Ex parte Pierce 155 Fed. 663; Sheridan vs. United States, 236 Fed. 305, 311 (9CCA).

An indictment charging a combination is sufficient when it alleges the ultimate plan—the result of concerted action together with specific acts by which the combination was carried out. It need have no more than a description of the method devised and adopted for the restraint of commerce. United States vs. Swift, 188 Fed. 92-98; United States vs. McAndrews et al., 149 Fed. 823-825-830; United States vs. Patten, 226 U. S. 525-538-540.

As has been pointed out, the indictment charges that the cement makers grouped themselves, and assigned the Pacific Coast territory among the groups, each group taking its own allotment of territory to the exclusion of the others; and that they fixed and agreed upon prices for Oregon, which was assigned to a group composed of Oregon and California makers.

Referring to the language of the indictment, it is found to give particulars as to the method devised and adopted for the restraint of commerce in this language:

> * * "That is to say, a combination, now here described, in restraint of, and which throughout said period of time has in fact restrained, said trade and commerce in the manner now here set forth: * * * * said defendants, so being in the active management, direction and control of the business and affairs of said concerns as aforesaid, in their said several capacities as officers and agents of those concerns, throughout said last-mentioned period of time unlawfully and knowingly * * * have by concerted action carried on and conducted

said business of said concerns without any competition as to the localities in said states of Oregon, Washington and California in which they respectively sold cement, except as to said portion of said State of Oregon west of said Cascade Mountain range to the extent hereinafter indicated, * * * * and without any competition as to the prices at which they would respectively sell such cement in said State of Oregon west of said Cascade Mountain range as hereinafter specified, * * * and unlawfully and knowingly have by concerted action prevented said southern California company from selling or consigning for sale its cement either in Washington or Oregon; * * * said northern California companies from selling or consigning for sale cement in Washington; * * * said Washington companies from selling or consigning for sale their cement either in Oregon or California; * * * and said Oregon company from selling or consigning for sale its cement either in Washington or California; * * * and unlawfully and knowingly have by concerted action prevented said northern California companies and said Oregon company from selling or consigning for sale their cement in Oregon otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon between them in advance of such sales and consignments for sale, etc."

It is argued by appellants' counsel that the indictment does not say whether the combination was consummated by a union of capital or skill. But the indictment shows that the combination was consummated by concerted action of the defendants in the management, direction and control of their concerns.

This is merely choosing other words to say that it was by a union of action and purpose in conducting their business that the combination was brought to consummation. If the means adopted were apt for the accomplishment of the forbidden thing, it is equally unlawful; and the indictment need only describe the means that were in fact devised and adopted for the restraint of commerce. In this case the means adopted was concerted action of the defendants in the management and direction of their companies; and the ends to which it was directed—the allotment of territory to the several groups and the fixing of prices—are particularly described.

The objections of defendants are overthrown by the case of Eastern States Lumber Association vs. United States, 234 U. S. 600-612, in which the Supreme Court said:

> "But it is said that in order to show a combination or conspiracy within the Sherman Act, some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Counsel argue further that the indictment furnishes no facts from which the court can determine whether the restraint contemplated was undue or unreasonable. Let us see if this is so. The indictment tells the court that the defendants barred from the

state of Washington the cement makers of Oregon and California; that they barred from California the cement makers of Oregon and Washington; that they barred from the state of Oregon the cement makers of Washington and southern California; and that they prevented the sale of cement in Oregon by Oregon and northern California companies at any price other than one fixed and agreed upon in advance. That previously these companies had for ten years been selling cement in interstate commerce on the Pacific Coast.

Given this state of facts, can the court determine from them whether the restraint effected or contemplated was undue and unreasonable? We submit with confidence that the court can so determine.

We submit that the indictment states facts which lead inevitably to the conclusion reached by Judge Wolverton in passing upon the demurrer. (But it was Judge Bean who presided at the trial). Judge Wolverton said in his opinion (Trans. P. 29):

> "This, to my mind states quite clearly the scheme and purpose of the combination. It descends to particulars, and no one need be misled into preparing his defense for something other than as alleged against him. The court knows what the charge is without the liability of misconception or mistake, and the defendants need not fear that another prosecution can follow after trial upon this indictment.
>
> Apply the standard of reason, which counsel insist that we shall, and then inquire further whether there is an undue restraint of trade or commerce. The indictment does allege that, by reason of these things, the defendants were engaged in undue and unreasonable restraint of

trade. We may put this to one side as a conclusion. There is sufficient alleged, however, from which to deduce this very conclusion. The concert of action which implies a combination for marketing their cement in particular locations, and the direct agreement between them for fixing arbitrary and non-competitive prices for the sale of cement in Oregon, is sufficient to stamp their demeanor as in restraint of trade and commerce. Such a combination is without the elements or indicia of a wholesome agreement and can not so be characterized."

The maximum requirement for criminal pleading is that the indictment contain all the elements of the offense charged; that it furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and that it inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

To accomplish these ends, there is required a degree of particularity; not such particularity as will satisfy and silence counsel for the accused, but reasonable particularity—so as to fairly meet those maximum requirements. This is the doctrine of United States vs. Cruikshank, 92 U. S. 542, and United States vs. Hess, 124 U. S. 483. The true test, as said by Judge Gilbert in Sheridan vs. United States, 236 Fed. 305, 311, is not whether the indictment might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other

proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In United States vs. Patterson, 201 Fed. 697, it is said:

> "It would manifestly be impossible to set forth in detail each separate transaction and the names of the individuals engaged therein, by which these plans of operations were carried out, without producing a paper so voluminous as probably to warrant the court in striking it from the files of its own motion as needlessly encumbering the record. * * * It would seem that the particulars for which the defendants call are matters of evidence which the government must produce when it attempts to prove the charges made by it.
>
> These defendants are charged with a conspiracy. * * * The defendants as officers and agents of the company were in control of its affairs as alleged. They knew the detail of dealings between that company and each of those concerns and the manner of treatment of them by the company as the agency through which the officers and agents controlled and operated and the methods of their respective absorption by said company. They must know whom to call in each to establish their defense. It seems to me they are advised of the nature of the charge against them quite sufficiently for them to make a defense. * * * I think it meets the rule of particularity of time, place and circumstances." This case was reversed, but on different grounds, in 222 Fed. 599.

The Supreme Court spoke to the same effect in Burton vs. United States, 202 U. S. 344, 372, when it said:

> "The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special and particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him."

Reverting again to the indictment, it is found to contain:

1...**A description of the trade and commerce restrained.** It shows that for more than ten years in the states of California, Oregon and Washington cement has been manufactured, marketed and generally used; also that this trade had been conducted by the companies of which defendants are the officers and agents, with a designation of the state in which each factory is located.

2. **Facts showing that it was interstate trade and commerce.** It is alleged that the companies have sold large portions of the cement produced by them in others **of said states** (California, Oregon and Washington) than the state wherein the cement was produced and "that in pursuance of such sales * * *

said concerns respectively have been continually shipping said cement to such consumers, dealers and agents in **such other states"** etc. (Trans. P. 10).

3. **The official relation of each individual defendant to his company,** and that such individuals "have been actively engaged, at said places of manufacture, in the management, direction and control of the business and affairs of the concerns with which they were so severally connected" (Trans. P. 11-12).

4. **That they engaged in a combination in restraint of said interstate trade and commerce** (Trans. P. 13). This is the only part of count one of the indictment, eight printed pages in length, which is in the language of the statute.

5. **A description of the method devised and adopted for the restraint of such commerce.** "Said defendants, so being in the active management, direction and control of the business and affairs of said concerns as aforesaid, in their several capacities as officers and agents of those concerns, unlawfully and knowingly have by concerted action carried on and conducted said business of said concerns" without competition as to territory and prices and effected the apportionment of territory among them and fixing of prices there detailed (Trans. P. 13-14).

6. **A statement that cement consumers have thereby been denied the benefits of competition,** and have been compelled to pay for cement arbitrary prices in excess of what they otherwise would have paid.

We confidently believe that the indictment meets every requirement of pleading and of the law.

In United States vs. Norris, 255 Fed. 423, 424 et seq. there was an indictment in some aspects similar

to the indictment here. A similar attack was made upon it. The court said:

> "It is then alleged that * * * defendants unlawfully and knowingly conspired together and engaged in a conspiracy in restraint of interstate commerce * * * in the several ways and by the several means now here set forth and described: (1) By preventing the hauling of sand, etc., (2) by causing the sand, etc., to remain upon and in the cars in the possession of said railroad companies so transporting the materials to their destination which materials were then in interstate commerce 'said defendants planned and intended to prevent the delivery of said materials contained in said cars'. It also states that defendants did prevent such delivery; (3) By influencing and causing the persons employed to unload and haul the sand etc., not to do so * * *. The only fair criticism is that the means or mode of operation do not appear in any way * * *. The indictment purports to state the means by which the offense was to be carried out but does not give all the particulars. These however, are only the 'means' of executing the offense * * *. It was the conspiracy which is denounced by the law, and that was complete when there was a meeting of minds to obstruct commerce. The motions in arrest of judgment should be overruled."

In Boyle vs. United States, 259 Fed. 803-805 (7 CCA) there was an indictment for combination to restrain trade. The court said:

> "Plaintiffs in error contend that none of the counts set forth an offense under that statute; it being claimed, among other contentions, that the means by which the object of the conspiracy

or combination was to be accomplished are not set forth. Without considering the means that are set forth in the indictment, it is sufficient to say that the pleader was not required to set forth any means. Where the object of the conspiracy is unlawful as in this case, it is unnecessary to set forth the means by which the object is accomplished."

(C) **Is the Indictment Vague and Indefinite?**

What has heretofore been said is pertinent to this question. It would not be useful to repeat it. This objection must fall before the authorities and considerations which dispose of the preceding objection.

Miscellaneous.

There are a number of statements in appellants' brief about the indictment which may be noticed here.

Counsel say: "Neither in this part of the indictment nor elsewhere therein does it appear that any of the companies with which the defendants were connected were ever competitors." On pages 9 and 10 of the transcript are found these parts of the indictment "that during said ten years divers concerns, in the manner and under the circumstances in this indictment hereafter set forth, have engaged in such manufacture and in such sale of cement directly and indirectly to concumers * * * (a list of the companies follows) that practically all of such cement consumed in said localities during the time aforesaid has been manufactured by said concerns; that said concerns, during said ten years, except as herein shown, have respectively sold large portions of the cement so manufactured by them to consumers of, and dealers in, such cement, whose several places of

consumption and business have been situated in others of said states than the one wherein said cement was so manufactured by said concerns respectively * * *" and that they had continually been selling and shipping cement from one state to the other.

Counsel isolate the two words "concerted action" and argue at length about their meaning and effect. The indictment is not to be construed by isolation of words and phrases and considering their meaning. The whole document must be construed together. The words "concerted action" must be considered as part of the entire sentence in which they occur. They are repeated in three clauses of a sentence of the indictment set forth on pages 13 and 14 of the transcript, as follows:

> "Said defendants, so being in the active management, direction, and control of the business and affairs of said concerns as aforesaid, in their several capacities as officers and agents of those concerns, unlawfully and knowing have by **concerted action** carried on and conducted said business of said concerns without any competition as to the localities * * * and without any competition as to the prices * * *
>
> "* * * and unlawfully and knowingly have by concerted action prevented" the several companies from dealing in cement in the various parts of territory specified
>
> "* * * and unlawfully and knowingly have by concerted action prevented" the sale of cement in Oregon except at arbitrary and agreed prices.

This is all part of one sentence. All of it must be given effect. It describes concerted action, not as a general, indefinite expression, but a concert of action

of the defendants while in the active management, direction and control of the business of their companies; a concert of action by them in their several capacities as officers and agents of their concerns, by which they unlawfully and knowingly ("each then well knowing all the premises in this indictment aforesaid") performed their functions of carrying on and conducting their respective businesses without competition as to localities or prices, barred designated companies from designated territory, and required the sale of cement in Oregon at arbitrary and predetermined prices. Such a union of action and purpose to effect the ends they desired was as efficacious to restrain the trade in which they were engaged as would have been any union of skill or capital; and was well adapted to produce a result which the statute was designed to prevent.

Counsel devote some space in their brief to an argument that because cement is a heavy article, it is economically right to let a factory supply all the trade nearest it, and that an arrangement to accomplish this would not be an undue or unreasonable restraint of trade.

This argument, carried to its logical end, would bar California manufacturers from the state of Oregon. But the indictment discloses two conditions opposed to this (1) under the illegal combination the California factories shared Oregon with the Oregon factory, at an arbitrary and pre-arranged price; and (2) for ten years prior to the combination the cement makers were selling and continually shipping to other states than those in which their factories were located. So that the combination alleged was not one by which each state was to be supplied by its own domestic manufacturers, even if such a combination

could be regarded as reasonable and wholesome.

Counsel argue that "it is entirely legal for parties to agree upon and provide for a uniformity of prices" and in support of this position cite a case holding illegal a "combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves" (Texas Standard Co. vs. Adoue, 83 Tex. 650, 657). It seems that further comment on this point is unnecessary.

Counsel argue that "the public has no right to unrestricted competition among all the persons engaged in any given business" citing United States vs. Whiting, 212 Fed. 475. The Supreme Court has expressed a different view, speaking through Mr. Justice Harlan:

> "In the judgment of Congress, the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce." United States vs. Northern Securities Co., 193 U. S. 197.

And the Whiting case, cited by defendants' counsel, holds that a combination having for its purpose the fixing of prices is illegal.

Objections are made that the indictment does not lay the venue, nor show the time of the acts charged. A reading of the indictment will show that these objections are without merit.

Count Two—Monopoly.

What has been said heretofore applies largely to the demurrer to the monopoly count of the indictment. There remains the question whether count two states facts sufficient to charge a monopoly.

To monopolize trade signifies the combining or

bringing together into the hands of one person, or group of persons, the control, or power of control, over a particular business.

The term "monopoly" as used in the act, includes the suppression of competition by the unification of interest. A monopoly exists within the meaning of the act even if the immediate effect of the acts complained of is not to create a complete monopoly. It is sufficient if they tend to bring about this result. The decisive question is whether or not the power exists, not whether it has been exercised. American Biscuit Co. vs. Klotz, 44 Fed. 721-725; United States vs. Keystone Watch Co., 218 Fed. 504-517; United States vs. Trans-Missouri Freight Ass'n., 166 U. S. 290-336; Addyston Pipe Co. vs. United States, 175 U. S., 211-237; Standard Oil Co. vs. United States, 221 U. S. 1-51-59, 61, 62; National Cotton Oil Co. vs. Texas, 197 U. S. 115, 129.

It is not questioned that the allegations of count one may properly be referred to and adopted as part of count two.

The indictment asserts that for ten previous years, practically all the cement used in Oregon, Washington and California had been made and sold by the nine companies named in the indictment, each of such companies selling in others of said states than the state wherein it had its factory; that from August, 1914, to the finding of the indictment there was excluded from the state of Washington the Oregon and California companies, leaving in Washington only the Washington group of cement makers; there was excluded from California the Oregon and Washington companies, leaving in California only the California group of cement makers; there was excluded from Oregon the Washington and southern Cali-

fornia companies, leaving in Oregon a group composed of Oregon and northern California companies, which group sold cement in Oregon only on arbitrary and agreed prices.

This shows the bringing together into the hands of a specified group of persons the power of control over the cement business in the states of California, Oregon and Washington. We submit that it constitutes such a monopoly as the statute intends to forbid.

Therefore the court ruled properly in holding the indictment sufficient.

ADMISSION OF EVIDENCE.

Exhibit 40—The Aberdeen Dealers Complaint.

Counsel first attack the admission of the letter of February 2, 1915, addressed to the Treasury Department, making complaint as to the situation in the cement trade.

In their brief, counsel have refrained from informing this court of the circumstances under which this exhibit was admitted. They argue its general admissibility, when its general admissibility has not been asserted. The real question is whether in the particular circumstances of its admission, and for the purpose for which it was admitted, the action of the trial court was proper.

It should be remembered that one of the features of the defense on which greatest stress was laid, was an attack upon the credibility of the witness Aman Moore. They carry this attack into this court by saying in their brief that Aman Moore "was discredited and apparently apologized for by the prosecuting attorney."

At the trial, upon the offer of the Aberdeen complaint (Ex. 40), a statement of its purpose was made as follows (Ev. P. 24):

> "This letter is not offered, if the court please, as evidence of the facts stated in the letter, but it is material for this purpose: one of the charges made by the defense here is that this prosecution was instigated by Aman Moore; that Aman Moore was responsible for it, even to the extent at one time of offering to dismiss it. Now, this letter shows where this prosecution originated, and it is for the purpose of showing original complaint to the government, and to overcome their contention about Aman Moore being responsible for it, that this letter is introduced, and not as any evidence of the facts therein stated."
>
> Court: "This is the same letter offered at the other trial, and admitted for that purpose alone."

Upon a renewed objection before the letter was read, the court further said (Ev. P. 25):

> "No, the statement in the letter, of course, is not evidence of any facts in it other than that complaint was made; that is all. I think the jury will understand that."

Immediately upon the reading of the letter to the jury, the court again said to the jury: (Ev. P. 25)

> "The jury will understand that this letter is introduced simply for the purpose of showing that complaint was made on this date, and is not to be considered by you as evidence of any facts stated in it."

Finally in the instructions, the court again impressed upon the jury the limited scope of the exhibit, saying (Trans. P. 465):

> "You will recall that there was also admitted in evidence a letter addressed by certain dealers in Aberdeen, in the State of Washington, to one of the government departments, and you will also recall that at the time the letter was offered in evidence the court called your attention to the fact that it was not competent testimony of any of the facts stated therein, but only that a complaint had been made, and for that purpose it was admitted, but should not be considered by you for any other purpose."

The government at no time has asserted that this letter had any other than the limited effect shown by this record. It was carefully limited by the court, both before and after it was read to the jury, and again in the final instructions. It was not used by the prosecuting attorney for any other purpose than stated by him when it was offered.

It was used only to meet a situation produced at the trial by defendants counsel when they sought to discredit not only the witness Aman Moore, but the prosecution as well, by impugning the motives of the prosecution; assuming that it was not bona fide, but merely in the furtherance of the interests of Aman Moore, making it appear to the jury that the prosecution was one initiated by Aman Moore, and that the government was so concerned with his welfare as to allow him to offer to dismiss the prosecution. When defendants' counsel, in open court during a trial, claim that the government is in effect the tool of an interested witness, and is prosecuting only to aid him, we submit that there is no ground for complaint if the government is allowed to show that the prosecution had its inception in an earlier complaint made elsewhere and by other persons, especially when the

evidence and its consideration are carefully limited to that point.

So we say again, the question here is not the general admissibility of the Aberdeen letter. The question is whether, in the peculiar circumstances here disclosed, the court was right in allowing the prosecution in this way to meet the insidious claims made in open court by the counsel for the defendants. But for such accusations by defendants counsel, the letter would not have been received; there would have been no need for it.

But for such an issue, dragged in at the trial by counsel, if the defendants had committed a crime, it was immaterial who made complaint; it was immaterial whether an individual prosecutor might be so weak as to consider dismissal on the suggestion of an interested witness. But practical experience teaches that the average juror is not a trained logician. Defendants' counsel recognized this fact and sought to gain an advantage in the trial by putting upon the government the onus of championing the cause of a witness who they believed they could present to the jury in an unfavorable light. It was defendants' counsel who tendered the issue; and when they sought to attack the bona fides of the prosecution as they did, they have little ground for complaint that the court would not oblige the government to be silent and submissive under such an attack. The most that was done was to meet the contention made by the defendants through their counsel.

If the witness were unsavory, as counsel claim, they were skilled enough in the practical psychology of jury trials to see an advantage in tying him tightly to the government. Their claim did not comport with the facts, and they were denied the advantage they

sought by evidence which the government had at hand. The situation was of their own making; and they now seek a fresh advantage from it by asserting that it was error to deny them the advantage they sought in the trial.

The most that was done was to meet an issue raised by defendants' counsel. The evidence was repeatedly and carefully limited in its effect. In these circumstances it could not have been prejudicial to these defendants, even if it be regarded as an immaterial issue.

The Interstate Bridge Freight Rate.

In the early part of 1915, the construction of the bridge across the Columbia River at Vancouver, Washington, was begun. At that time the Oswego plant of the Oregon company was not completed. The first combination was in effect, so that the California companies were staying out of Washington. The cement companies of Washington and California were jointly serving the state of Oregon as far south as Salem.

The prevailing price of cement at that time was $1.90 a barrel at Portland or Vancouver, Washington. The Spokane makers of cement had not competed west of the Cascades, because of a freight rate of 25c per hundred pounds, which amounted to $1.00 per barrel.

The Pacific Bridge Company secured the contract for the piers of the new bridge, and required some 300,000 barrels of cement. Mr. C. F. Swigert, president of the Pacific Bridge Company, desiring to get a better price on cement, and being in touch with one of the Spokane makers, the International, got a bid from that concern of $1.65 per barrel f. o. b. Portland,

on condition that the Spokane Portland & Seattle Railroad would make a freight rate of 13½c per hundred on cement. The International had a plant at Irvin, Washington, near Spokane.

Mr. Swigert saw Mr. W. D. Skinner, traffic manager of the Spokane Portland & Seattle Railroad, and obtained from him a written memorandum, agreeing to publish the 13½c rate if the Spokane plant got the contract for the Interstate bridge cement. (Ex. 151.) Thereupon the Pacific Bridge Company contracted with the Spokane plant for cement at $1.65 per barrel, and the Spokane company wrote Mr. Skinner advising him that the contract was closed and asking for the publication of the new rate.

Immediately the defendant Muhs, of the Santa Cruz and Standard companies, in San Francisco, heard about what had been done. There followed a series of telegrams, letters and conferences (see Ex. 75, Trans. P. 598 et seq.) between the California and Washington cement makers, in an effort to keep the rate from going into effect. Defendant Coats went to St. Paul, Minnesota, to the head offices of the Spokane, Portland & Seattle Railroad, while Eden went to Del Monte, California, to see Mr. Louis Hill, in an effort to have them direct Traffic Manager Skinner to withdraw his promise of the 13½c rate. Defendant Baillie also saw Mr. Louis Hill. The freight rate of the other western Washington companies to Portland and Vancouver was 8½c per hundred. The final result was that the rate was not published, but the California and Washington companies furnished the Interstate bridge cement at $1.65 per barrel. Orders for the cement were placed with the Spokane company, but were filled by the California or Washington companies. Later one of the Washington com-

panies made a contract directly with the Pacific Bridge Company to supply the needed cement for $1.65 per barrel, (Ex. 38) but a large part of the cement actually supplied was California cement. After this contract was filled, the Bridge company was not able to obtain cement except at prices higher than $1.65.

This in brief is the history of what is referred to as the Interstate bridge matter, and complaint is made of the reception of this evidence. The results of this evidence are as stated in appellants' brief, viz: it "showed clearly that the western Washington cement plants and the northern California cement plants were working in harmony to prevent this rate going into effect, and to prevent such rate going into effect they were willing to and subsequently did, sell cement to the Pacific Bridge Company at less than the then prevailing market price in the city of Portland." They went a step farther, and in some way got the Spokane plant, which had a contract for the cement and a written promise of a favorable freight reduction, out of the way.

This was not claimed to be unlawful per se., but was offered in connection with the course of dealing of the cement companies for consideration in its relation to all the other facts in the case. We believe the reception of this evidence was proper and that Judge Bean's instructions were as favorable as defendants could rightly expect when he told the jury (Trans. pp. 467-468):

> "I have permitted the government to introduce evidence tending to show that in 1915 the Spokane, Portland and Seattle Railroad Company promised to reduce its freight charges upon Portland cement from some point in Washing-

ton, to Portland and Vancouver, and that the western Washington cement manufacturers and perhaps some of the northern California concerns, combined to defeat such proposed change in freight rates, and that they succeeded in doing so by promising to supply cement from their mills, for the Interstate bridge, at the price for which cement for this purpose was offered by the Irvin plant, if the rate had been installed. Such action on the part of the Washington and California makers, if proved to your satisfaction, would not of itself constitute a violation of the statute on which this indictment is based, but it would by (be) evidence tending to support the charge of an illegal or unlawful combination.

It is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust or discriminatory, and which he may think will injuriously and unduly affect his business. Any number of persons who may be similarly situated may join in opposing the institution of such a freight rate. It is admitted that the western Washington cement manufacturers and some of the California concerns combined, in 1915, to defeat a proposed change or reduction in freight on cement from Spokane, or Irvin, in Washington, to Portland or Vancouver, but this action on their part was not in itself unlawful or illegitimate and did not constitute a violation of the statute; but you have a right to consider their acts and conduct in that matter, and not only a right, but it is your duty to consider their acts and conduct in reference to this matter, as bearing upon the question as to whether they indicate

or tend to support the charge of an unlawful or illegal combination."

Counsels' argument is that this evidence is inadmissible because the acts disclosed were not in themselves unlawful. But is that sound law? Is that evidence relevant and material only which discloses the defendant in a criminal act? No cases have been cited holding such a rule; and all reason is against it. Probably no crime ever was committed but was made up of a combination of lawful and unlawful acts.

A murderer goes to the home of his victim—a perfectly lawful act in itself; but may it not be proved on the trial? He provides himself with a weapon, it may be an ax or a club or a gun. It is perfectly lawful for any man to do that, barring local police regulations about firearms. Is the evidence incompetent because the act is in itself lawful? Instances may be multiplied interminably.

In this case, the charge is a combination in restraint of trade. So far as it is proved by direct testimony, the first unlawful agreement was made in a conference of cement makers at San Francisco. Now in order to prove that, it would be material to show that certain individuals went to San Francisco at that time. Would not such evidence be admissible? Clearly it would. But what is unlawful about any man going to San Francisco?

Counsel rest squarely on this position. They say: "In other words evidence of the combination between cement manufacturers to do a lawful act cannot constitute evidence of an unlawful combination or a combination to do an unlawful act." If the Interstate bridge freight rate were the only fact in this case, there might be some force to that statement. But it is only one of the many facts here; and we be-

lieve it is entirely proper that that fact should be considered in its relation to the others in the case.

It is one thing to say that a group of cement men combined to forestall an objectionable freight rate; and it is quite another when the whole story is told—quite another thing to say that a group of cement men combined to allot between them the territory of the Pacific Coast and fix prices for cement therein; that the Californians withdrew from Washington, and only quoted in that state prices which they knew were higher than the Washington makers were getting; that the same Californians continued to sell lime and plaster in Washington; that the Washington makers sold cement in Oregon only as far south as Salem, by arrangement with the California makers; that the Washington makers had a freight rate to Portland of 8½c per hundred pounds; that the prevailing price of cement f. o. b. Portland was $1.90 per barrel; that an outside concern was promised a freight rate of 13½c per hundred pounds to Portland, and contracted on that basis to sell cement at $1.65 per barrel; that the same group of cement men used every means available to forestall the 13½c freight rate, and to do so got the outside concern out of the way, and themselves supplied the cement at $1.65 per barrel, and then went back to a higher price.

When an indictment charges that certain trade is monopolized in certain territory, and the defendants serving that territory expend so much energy in keeping out a would-be intruder, is it not material and relevant testimony? We submit that the Interstate bridge incident was one that was proper for the jury to consider in determining whether there was a combination in restraint of the cement trade. This detail with others combined to make up the complete pic-

ture. And we submit that evidence is not to be excluded because it shows a fact in itself lawful, a thing that any man has the right to do. If it were otherwise, few laws could be enforced; few offenders would be punished.

We have argued this point on the assumption that the acts of the defendants were lawful. The case was submitted to the jury on that assumption. The jury was instructed that "it is entirely lawful for anyone to do what he can to prevent a transportation company from putting in a freight rate which he may deem unjust or discriminatory. * * * Any number of persons who may be similarly situated may join in opposing the institution of such a freight rate." (Trans. P. 468.)

This was a more favorable assumption to the defendants than they were entitled to. Because their actions in this matter may have been unlawful. They were lawful or not, depending on their ultimate purpose. If they were inspired only by honest objections to the freight rate, their actions were lawful. But if they found their inspiration in a purpose to keep out a competitor; to restrain unduly interstate trade in cement; to preserve for themselves the cement trade in the territory in which the combination was effective; to prevent the intrusion into that territory of a newcomer, then their actions were unlawful. And the court would not have erred had he submitted the facts to the jury on that basis, and left it for the jury to determine, upon all the facts, whether the interstate bridge incident was lawful or unlawful.

In United States vs. Reading Company, 226 U. S. 324-352; 57 L. Ed. 243-252, certain defendants had combined to defeat the construction of a competing railroad. The means adopted, separately considered,

were lawful, and the contention was made there, as here, that there was no violation of the law because they had done only those things which they had the right to do. The Supreme Court said: (352)

> "But if the defendant carriers did * * * combine to restrain the freedom of interstate commerce * * * the parts of the general scheme, however lawful, considered alone, became parts of an illegal combination under the Federal Statute * * *."

See also Swift & Co. vs. United States, 196 U. S. 375-396 and United States vs. Rintelen, 233 Fed. 793-799.

Intrastate Business.

Objection is made to the reception in evidence of letters relating only to cement trade within the state of Washington. It is argued that such letters could have no proper bearing on the question whether interstate commerce was restrained.

Before the combination was effected, there was interstate trade in cement in the state of Washington, in which the Washington and California companies were in competition. In order to determine the effect of the combination on that interstate trade, it is proper to examine the condition of the cement trade in Washington after the combination. A comparison of the cement trade under competitive and non-competitive conditions could not be immaterial because by reason of the combination, that cement trade in Washington had ceased to be interstate trade and had become entirely intrastate trade. Indeed the very change in the nature of the trade from interstate to intrastate brought about by the combination would establish the restraint of interstate commerce which

it is claimed was the purpose of the combination, and which the statute was enacted to prevent. It would be a strange situation if cement dealers in interstate trade could effect a combination by which part of them withdraw entirely from a state, leaving the others in undisputed possession, as the California companies did in this case, and the government could by such objection as this be prevented from showing the condition of the cement trade afterward in the state from which they had withdrawn.

Exhibit 74.

Counsel complain in their brief about these letters, saying they are in relation to promotion work, and to the activities of the National Portland Cement Association. It is not claimed that the illegal combination was effected through the national association, and the letters were not offered because of their statements in regard to promotion work. They are admissible for a different reason.

It will be remembered that the original combination was consummated in 1914. It is the theory of the government that some time early in 1916, before the cement of the Oregon mill at Oswego came on the market, there was a further meeting of the combining cement makers at San Francisco, at which time they readjusted their arrangements so as to make room for the product of the Oregon Company, as a result of which the Washington companies withdrew from Oregon.

One of the issues was whether there was such a meeting at San Francisco. Naturally the men who attended the meeting were not available to testify about it. Referring now to Exhibit 74, it is found to be a letter dated April 18, 1916, from defendant J. C.

Eden, of the Superior Company at Seattle to his co-defendant W. H. George of the Cowell Company at San Francisco, and George's response thereto.

Defendant Eden in the opening paragraph of his letter writes to Mr. George thus:

> "Was mighty sorry on my visit to San Francisco last week not to have had time to have a few minutes talk with you, not only to speak to you about the Association, but to thank you personally for the wonderful party you gave us in San Francisco when I was there about two months ago * * *"

This "wonderful party" may or may not have been the occasion of the readjustment to make room for the Oregon company. It shows that at the time in question defendant cement makers met at San Francisco. At the time referred to in the letter, defendant Butchart was at Del Monte and San Francisco, as his letters show, expecting to see the California and Washington makers. Mr. Eden's letter was only a circumstance, but the jury was entitled to consider it. Mr. George's letter has no importance, and its only reason for being in the case is that it was part of the correspondence between him and Mr. Eden.

Exhibit 76.

As to Exhibit 76, it is a letter from Mr. Eden to Aman Moore written in March, 1916. This is the same Mr. Eden who is a defendant, and president of the Superior company at Seattle. The government claimed that the Washington companies agreed to withdraw from Oregon in 1916.

Exhibit 76 has one clause corroborating the government's theory, viz: "as we will probably not par-

ticipate in the cement tonnage of the State of Oregon, we can not see our way clear to assume any part of the expense of the promotion work." The only thing of interest in this letter is this statement that the Washington company would not participate in the Oregon cement business; but for that statement it is pertinent and admissible.

Exhibit 98 is Moore's answer to Exhibit 76.

Exhibit 77.

Exhibit 77 is another of Mr. Eden's letters, this time to a co-defendant, Fred R. Muhs, of the Santa Cruz and Standard companies in California with Muhs' answer. Again it confirms the withdrawal of the Washington company from Oregon. The letter is dated July 29, 1916. He says:

"When the northern mills were marketing cement in Oregon, we made it a practice to employ an inspector" etc. Thus showing that the northern mills were no longer marketing cement in Oregon. It is another circumstance, not of prime importance either way, but sufficient to justify its admission.

Exhibit 89.

This letter was written (Trans. 628) by Aman Moore to the defendant Butchart. A number of Mr. Butchart's letters were introduced, among them Exhibit 88 (Trans. 625) dated December 29, 1915, saying among other things:

> "We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers * * * It will be difficult for us, a new company, to secure the higher price unless we are permitted to

> name the price at which cement is to be sold in Oregon. An understanding should be arrived at whereby we are assured of disposing of the output of the 1 kiln plant. To obtain this will require careful handling, but I am in hopes that it can be done * * *"

Aman Moore's letter, which is Exhibit 89 was in response to the foregoing letter of Mr. Butchart. This letter of Moore is admissible because it is a part of the correspondence between the men, and also because, in response to the above quoted suggestions, Moore wrote the defendant (Trans. 628):

> "As you know, it has been the universal practice in this country for a new plant when entering the market to force its way in by cutting prices * * * If we can establish our own market without cutting prices, we will have performed a miracle * * *"

Exhibit 105.

This exhibit consists of three letters (Trans. 651-654) passing between defendant W. H. George and Carl Leonardt, the latter being one of the stockholders of the Oregon company. They were written in February, 1916, at which time Mr. Butchart was in California where he said he was going to consult the California makers of cement. This exhibit shows that defendant George was trying to get in touch with defendant Butchart at that time.

Exhibit 30.

Counsel's argument as to Exhibit 89 indicates that they intend Exhibit 30.

This is a letter written September 24, 1914, by de-

fendant Tyler Henshaw to defendant Butchart, at a time when the plant at Oswego was being projected. (Trans. 805-810.) It is a long letter, discussing the possible building of a new cement plant in California, (Trans. 806) and mentions the proposed Oregon plant. (Trans. 809.) The letter, in relating the writer's conversation with Leonardt, shows the natural attitude of an existing maker of cement toward a supposed new competitor. It also contains a very thinly veiled suggestion as to what the new Oregon company might expect in the way of competition at that time. It was material for the jury to compare Henshaw's expressions of attitude at that time, with what his attitude actually was when the Oregon plant began operating nearly two years later. This letter is another of the many circumstances which the jury was entitled to consider in determining the situation with reference to the cement combination. It is true the letter itself suggests no illegal combination.

It suggests the opposite; it suggests the serious competition the new Oregon mill might expect to meet. By telling defendant Butchart what he could and would do to Leonardt's new mill, he made Butchart ask himself what might be the fate of the new Oregon mill. But that was in 1914, and when two years later the Oregon mill began making cement, Henshaw's conduct was so unlike his promises that it fairly raises the question what brought about the change; and is proper for consideration in determining whether there was a combination.

Evidence as to Prices.

Objection was made to evidence of the price paid by consumers for cement in 1916. Such evidence was proper under the indictment, which alleges that the

combination prevented the sale of cement in Oregon otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon in advance, and further that consumers "have been compelled to pay for such cement arbitrary prices, and prices greatly in excess of the prices at which they would have secured such cement if said defendants had not engaged in said unlawful combination in restraint of such trade and commerce as aforesaid" (Trans. P. 14).

Counsel say that no attempt was made to show that these appealing defendants undertook to fix prices. We introduced the letter of defendant Butchart (Ex. 88, Trans. 625) in which he said he was going to confer with the Washington and California makers and wrote: "It will be difficult for us, a new company, to secure the higher price **unless we are permitted to name the price at which cement is to be sold in Oregon.**" In the face of this counsel argue "If consumers were deprived of the benefit of competition and were compelled to pay arbitrary prices for cement, the defendants on trial had nothing to do with this result." Such argument can not overcome the effect of such a letter as Exhibit 88.

EXCLUDED EVIDENCE.

The Minor Letters.

Complaint is made of the exclusion by the court of two letters written by Mr. Wirt Minor to Aman Moore, under date of July 25, 1916, and August 29, 1916 (Trans. 811-814). Also a telegram to Mr. Butchart from C. Boettcher, R. J. Morse and E. Possett dated July 27, 1916. (Trans. 825.) It is argued that these letters and telegram were offered to impeach Aman Moore and show that "Aman Moore,

notwithstanding the charges he had made against Butchart and Clark M. Moore, had agreed that the sales department should remain in charge of Clark M. Moore,, and that Butchart's powers as president should not be interfered with." (Brief 117.)

Mr. Minor was one of the directors of the Oregon company, and was its attorney. He was on the witness stand (Ev. 579 et. seq.) and had full opportunity to testify directly to any facts within his knowledge tending to impeach Aman Moore. Mr. Minor testified in detail regarding the suit for an injunction brought by Aman Moore, and to his own demand upon Aman Moore for the evidence of an illegal combination, but nothing was said in Mr. Minor's testimony about the letters of July 25 and August 29, 1916.

There is nothing in either of these letters to support in any way the claim now made that they were for impeachment, nor that Aman Moore agreed to be satisfied with Clark Moore or Mr. Butchart. Both letters were written by Mr. Minor. The first has to do entirely with the manner of calling a special meeting of the board of directors (Trans. 811-813). The second is a pointed demand by Mr. Minor that he be afforded an opportunity to investigate the facts which were the basis of Aman Moore's suit, an opportunity to examine the evidence of those facts, and that he be advised by what authority Aman Moore brought the suit in the name of the company. (Trans. 814.)

Not only do the letters themselves show nothing of impeachment, but no questions concerning them looking toward impeachment were asked of Aman Moore. It has already been remarked that Mr. Minor on the witness stand was silent about these letters. They were not offered for impeachment. They were

offered together, in the course of cross examining Aman Moore, in the following manner: (Ev. 212)

"Mr. Winfree: How about these others?

"Mr. Humphreys: I don't see that they are material; I don't care about them particularly except that they are not material. One of them is concerning the call of a meeting of directors and the other is a demand from Mr. Minor of Aman Moore to supply him with evidence in his possession.

"Court: I don't think these letters have anything to do with the case.

"Mr. Minor: We except to your Honor's ruling. We except to your Honor's ruling in regard to the letter which I wrote to Mr. Aman Moore July 25th, 1916, in which I expressed my willingness and desire to have this meeting called. The other I wrote him on August 29th and I desire to except to your Honor's ruling on that.

"Mr. Winfree: It is admitted they were sent and received?

"Mr. Humphreys: Yes."

Where no foundation for impeachment is laid, where the letters themselves are not of impeaching character, and where their author afterward is on the witness stand with full opportunity to give direct evidence of any impeaching facts within his knowledge, we believe there can be no error in excluding such letters as these.

The telegram (Trans. 825) is discussed here because counsel in their brief have grouped these three exhibits for discussion. Like the letters, the telegram is not of impeaching character. It is not signed by any of the defendants in the indictment, and no foundation for impeachment was laid in the examination of Aman Moore. The telegram was not signed

by him, nor addressed to him. It was first offered at the trial in connection with the evidence of Mr. Minor (Ev. 592-593) who testified:

"The telegram dated June (July?) 27th addressed to Mr. R. P. Butchart was either read to me or shown to me by Mr. Aman Moore; the other telegram I never saw until a few days ago, possibly a week ago, I don't know the exact date. I said telegram; I should say that either the original telegram or a copy of the telegram was shown or read to me; I don't know about the original."

"Mr. Winfree: Offered in evidence.

"Mr. Humphreys: I don't see that this telegram is material; addressed to Mr. Butchart, and signed by three persons not connected with this case.

"Mr. Winfree: I will ask the court to look at it before ruling on it; we offer this, your Honor, for the purpose particularly of impeaching Mr. Aman Moore, to show what the agreement was at that time and Mr. Moore's action in connection with his agreement with the company.

"Court: Was Mr. Moore asked anything about this?

"Mr. Humphreys: He was not.

"Court: Not called to his attention at all?

"Mr. Winfree: This particular telegram was not, but the meetings referred to were called to his attention and he testified with reference to meetings between Mr. Ross and himself afterwards and he denied that he was to take the position suggested in this telegram. It is a flat contradiction of Mr. Moore's testimony.

"Court: I don't think it is competent; signed by three not interested in this controversy; I don't think it is competent against Mr. Moore."

There can be no doubt of the correctness of the court's ruling. The principles on which it stands are elementary. If the defense expected to show, as counsel say, that Aman Moore agreed that Clark Moore should stay, and that Mr. Butchart's presidential powers should not be disturbed, their proper course was to bring to the witness stand the three men who signed the telegram. There was nothing in the court's ruling that barred them from producing such testimony, if it were available. They were not denied any right to impeach Aman Moore, nor to attack his credibility. But the rules for the impeachment of witnesses are well settled, and they do not permit of impeachment by the sort of evidence here in question.

INSTRUCTIONS TO THE JURY.

Monopoly.

It is argued that count two of the indictment limits the charge of monopoly to the state of Oregon, that the charge of the court to the jury is not so limited, and that it is therefore, erroneous. But such an instruction would not have been proper.

There is a distinction between the venue of the acts which produce the monopoly, and the effect of those acts on trade and commerce. Whatever was done in the state of Oregon by way of overt acts could have effect reaching beyond the boundaries of the state and produce monopoly elsewhere. Similarly interstate trade within the state of Oregon could be affected by acts committed without the state, but which produced monopolizing results within the state.

Count two of the indictment says that the defendants

"in and by engaging * * * in the unlawful combination in restraint of the trade and commerce of said concerns in said first count described * * * unlawfully have, in the District of Oregon and within the jurisdiction of this court, monopolized said trade and commerce, it being a part of the trade and commerce among the several states, etc."

This shows not only the place where the monopolizing was done, i. e., in the District of Oregon; but also the thing monopolized, i. e., "said trade and commerce," and the same count previously refers to "the trade and commerce of said concerns in said first count described." Reference to the first count discloses that it describes the trade and commerce in cement carried on by the concerns named in the states of Oregon, California and Washington. It needs no argument to demonstrate that an act done within a state may have effect reaching beyond the boundaries of the state. There is no need to confuse the venue of the act with the thing on which the act has effect.

The charge of the court (Trans. 447) refers the jury to the indictment for details "You will have the indictment and can examine it at your leisure to ascertain the details of the statement. For the present purposes what I have said is, I think, sufficient. The second count charges the same parties, by means of the same arrangement and combination, with monopolizing the trade in cement in these several states."

Defendants' counsel, in requesting instructions on the monopoly count, used similar language (Trans. 845) and assign as error the court's refusal to give their instruction. It is in these words:

"There is no evidence in this case which

tends to show that either R. P. Butchart or Clark M. Moore monopolized or attempted to monopolize the trade or commerce in Portland cement among the states or combined with any person or persons to monopolize any part of the trade or commerce in Portland cement among the several states. You will therefore return a verdict in their favor in the second count of the indictment."

In addition to framing this instruction, counsel failed to save a proper exception to the instruction given. The exception is noted at page 662 of the transcript of evidence, as follows:

"And also to except to so much of your Honor's charge as relates to monopoly."

That such an exception is inadequate is held in Hammond vs. U. S. (9 CCA) 246 Fed. 40-47 et seq. and Jones vs. U. S. (9 CCA) 265 Fed. 235-241. The vice in this exception is that it does not state any point as to which there was error. This point was raised for the first time in a brief filed by counsel in support of their motion for a new trial.

In Hammond vs. U. S. 246 Fed. 40-47, Judge Ross said, quoting 236 U. S. 512:

"The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any grounds other than the ones specifically called to the attention of the trial court."

In Jones vs. U. S. 265 Fed. 235-241, Judge Morrow

quoted with approval the following language of Judge Ross:

> "The rule is established, by decisions almost innumerable, that to entitle an appellant to call in question instructions given by the trial court to the jury, the exception or exceptions taken thereto must be sufficiently specific to direct the attention of the court to the particular error or errors complained of, to the end that the court may correct the error should one be found to exist, before the retirement of the jury."

In discussing the instructions relating to monopoly, counsel in their brief complain about that part of the charge which says that the geographical limits of Drain or Roseburg on the south and the Deschutes River or Umatilla on the east were material as bearing only on the credibility of the witness Aman Moore. This part of the instruction appears at page 452 of the transcript. A reading of it will show at once that it refers only to count one of the indictment, and that it was not given by the court to the jury as a part of the charge relating to the monopoly count.

Butchart's Letters.

Particular complaint is made of an instruction to the effect that the jury had the right to consider Butchart's failure when on the witness stand to say anything about the meetings in San Francisco referred to in his letters, or to offer any explanation of the letters or any other statements contained therein. As counsel say in their brief, this instruction was based on Caminetti vs. U. S., 242 U. S. 470-493. The instruction itself is at pages 466-467 of the transcript, and is as follows:

"Now the defendants Moore and Butchart have each testified in this case. You should apply to their testimony the same rule that you apply to that of any other witness, and give them such faith and credit as you think their testimony is entitled to, keeping in mind, as you should, in weighing their evidence, the interests they naturally have in the result of this case. Mr. Butchart, however, while upon the stand, testified that he did not make certain statements attributed to him by Aman Moore, but said nothing about the letters written by him to Aman Moore; nor did he say anything about the meeting in San Francisco referred to in these letters, nor offer any explanation of the letters, or any other statement contained therein. Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross examined as to matters not covered by direct testimony, but (in) passing upon the evidence in this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He can not be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case, to comment unfavorably upon the defendant's silence. But where a defendant elects to come upon the witness stand and testify, he then subjects himself to the same rulings that apply to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish

against him, such failure may not only be commented upon, but may be considered by the jury with all the circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence, if there is any against him, he would have done so."

The objection most strongly urged by counsel to this instruction is that "there was nothing in these letters which Mr. Butchart was called upon to deny, and nothing in these letters which he was called upon to explain"; and also that he "could not be called upon to say anything about the 'meeting in San Francisco' referred to in these letters."

Before quoting the letters, we wish to refer to the situation, as disclosed by the record, in which the letters were written.

Defendant Butchart was a cement maker in British Columbia. For some years he had owned stock of the Washington Portland Cement Company to the amount of $100,000. Since 1910 he had been financially interested in the Oswego project in the varying forms of its organization. In December, 1915, he became president of the Oregon company, which completed the construction of the Oswego plant and operated it.

The letters, then, were written by a man who was on the point of launching a new cement factory, in a country whose laws require the free and natural flow of interstate commerce along its accustomed channels; he was on the point of coming into the cement market in the only territory on the Pacific Coast where the cement trade retained its interstate character, namely in the state of Oregon. In that

state the California and Washington companies still carried on interstate trade in cement from Salem north to the Columbia river.

As the plant neared completion, the sales manager, Aman Moore, became increasingly anxious to adopt an aggressive sales policy. The correspondence between the two men, in this situation, shows clearly what was in defendant Butchart's mind. (Trans. 616-645.)

He wrote from British Columbia on June 14, 1915:

> "Our company above all others has an object in keeping prices up. There is no reason for cement selling lower at Portland than at San Francisco and Seattle, and I think I can aid in effecting this." (Trans. 623; Ex. 86.)

On December 29, 1915, he wrote from Victoria, B. C.:

> "We will be unable to quote prices on any quantity until we have gone into the subject with the California and Washington makers. Unquestionably the price should be the same at Portland as at Seattle, San Francisco and Tacoma * * * It will be difficult for us, a new company, to secure the higher price unless we are permitted to name the price at which cement is to be sold in Oregon. An understanding should be arrived at whereby we are assured of disposing of the output of the 1 kiln plant. To obtain this will require careful handling but I am in hopes that it can be done. * * * I have no invitation, and in any case will be unable to attend the manufacturers' meeting in San Francisco, but will meet one or more of the makers in Seattle on Monday or Tuesday next and will impress upon them our views. I must be in Toronto on the 10th and

purpose returning home by way of San Francisco towards the end of the month and if necessary will try and arrange to have some of the Washington makers meet me there, to go into the whole subject, and as I am in very close touch with some of the makers, I think it better that you leave this entirely in my hands for the present." (Trans. 625-626; Ex. 88.)

He was at Del Monte and San Francisco in February and March, 1916, when Aman Moore wrote urging that a decision be made as to some matters concerning the sales department. Mr. Butchart wrote on February 15, 1916, from Del Monte:

"I hope to see Mr. Hinshaw and Mr. Coats shortly * * * I have arranged to go to San Francisco on the 17th and will write you afterwards regarding sales * * * Trans. 638; Ex. 92.)

Again writing from Del Monte on March 2, 1916:

"I note what you say regarding pushing sales and am quite as anxious as you that we should get busy on the sales end, but we are not ready to make a quotation to any one. Don't worry. Have you named any price for the car loads you have sold? (Trans. 639; Ex. 94.)

On March 14, 1916, he wrote from San Francisco:

"I can quite understand your impatience to push sales. Some of the Washington makers will be here Friday. I expect we will have something definite next week, in the meantime just as well to forego any expenditures in the way you suggest. (Trans. 643; Ex. 96.)

And finally from Los Angeles, on March 31, 1916, this very significant letter to Aman Moore:

"I learn with regret that you have recently

had Mr. Hollister in Washington soliciting business for our company. This is in the face of a request that you do nothing in this respect other than to advise the trade by circular letter that Oregon cement will be on the market in April. You assured me that you would do nothing further than this. I would ask you again to leave the sales alone for a time and I have written Mr. Newlands to confer with you regarding some other position in the works for Mr. Hollister. (Trans. 644; Ex. 97.)

Accompanied by a copy of letter to Mr. Newlands, then superintendent, saying:

> "Mr. Hollister has been doing things he should not do, at Walla Walla, Washington, and Baker, La Grande and Pendleton, Oregon, and although Mr. Moore is responsible for this, I do not see that we require Mr. Hollister's services further in connection with sales. If you can find anything else around the plant that he can do and make himself useful you might arrange to retain him, but if you can not do so profitably you would better ask for his resignation." (Trans. 644-645; Ex. 97.)

In addition to the foregoing letters, Aman Moore testified (Trans. 160; Ev. 137) that on arriving at Portland Mr. Butchart told him that he (Butchart) had had a meeting with California and Washington cement makers at San Francisco during the week of March 17 to 25, 1916, at which they agreed to limit the territory of the Oregon company, and that because of the invasion by Hollister of Washington and eastern Oregon territory under the direction of the witness, defendant Henderson of the Pacific Portland (California) and defendant Coats of the Wash-

ington Portland companies had said that Aman Moore was persona non grata as sales manager, and insisted that he be removed; and about three days after Mr. Butchart returned from California, Aman Moore was removed as sales manager and defendant Clark Moore was installed in his place.

Defendant Eden testified (Trans. 129; Ev. 78-79) that he met various Pacific Coast cement makers frequently at San Francisco from 1914 to 1916, and that at practically every meeting there were discussions as to prices charged and the territory served by the various mills.

Defendant Coats testified (Trans. 211; Ev. 222) about the original combination of 1914, and said there was a further conference at San Francisco in the winter of 1915-1916—he fixes the time as December, 1915—at which there were present practically the same persons who attended the former conference, and at which the Washington cement companies were told to get out of Oregon, and he said that they did so.

Other witnesses established the fact that after the Oregon company came into the market the Washington companies no longer sold cement in Oregon. (Halderman, Trans. 220; Nottingham, Trans. 216; Clark, Trans. 228, Ex. 116, Trans. 655; see also Ex. 76, Trans. 608; Ex. 77.) Oregon cement came on the market, not only without a reduction in price, but at a higher price than had been paid for Washington and California cement (Trans. 220, 224, 255) and the Oregon company did not sell in Washington, but ignored or evaded inquiries from Washington, from even so reputable a concern as the Denny-Renton Clay & Coal Company, which asked for a quotation on 100,000 barrels (Trans. 647) with the result, as testified by its general manager, (Trans. 262) "We

were not given any reason particularly; we were simply staved off from time to time."

Requests to the Oregon company from points in Washington for quotations were avoided (Exhibits 80, 103, 145, 146, 147, 148, 149, 150; Trans. 614, 615, 649, 668, 669, 670, 671, 672) or if a quotation was made, it was only after defendant Clark Moore had telephoned his co-defendant Eden, at Seattle to learn their price (Trans. 128-131) and then quoted a price which was not only higher than the Washington makers were quoting (Ex. 72, 73; Trans. 594, 595) but a price ($2.68 per bbl. f. o. b. Seattle) which, allowing for freight, was higher than the Oregon company was getting at Portland.

This continued until the expose resulting from Aman Moore's law suit, and its culmination is shown by a telegram sent on August 29, 1916, by the assistant sales manager, J. E. Moore, to his brother, sales manager Clark M. Moore, at Denver, (Ex. 134; Trans. 547) as follows:

> "Bitter complaint in director's meeting because we do not sell in Vancouver; lawyers also kick to beat the band; don't you think it best to establish agency there? Do not see how we can get around it with things going the way they are. I advise it."

This is a brief outline of the facts proved by the government, and indicates the condition of the case when the defendant Butchart took the witness stand. He limited his testimony (Trans. 354-357; Ex. 439-441) to a denial of the conversations testified to by Aman Moore. He did not deny that there were meetings at San Francisco of the kind Aman Moore told about; he merely testified that he did not tell Aman Moore there were such meetings. He did not deny

that there was an agreement with California and Washington cement makers limiting territory; he merely testified that he did not tell Aman Moore there was such an agreement.

Mr. Butchart was silent about his letters announcing his purpose to go to San Francisco to confer with the cement makers to the end that the Oregon company should name the price of cement in Oregon, and that an understanding be reached assuring his company of disposing of the output of the 1 kiln plant.

The letters show clearly what Mr. Butchart intended to do. The facts and circumstances show clearly what actually was done. When the whole case is considered, it is believed to come squarely within the rule in the Caminetti case. It will be seen, upon comparison, that the instruction complained of is as nearly in the precise language of the instruction that was approved in the Caminetti case as it was possible to make it.

The charge of the court did not put upon Mr. Butchart the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. It commented only upon his omission to speak about matters peculiarly within his own knowledge, namely, the letters written by him to Aman Moore, or the meeting in San Francisco referred to in those letters or to "offer any explanation of the letters or any other statement contained therein." The jury was then told:

> "Now this was his privilege, and being a defendant he could not be required to say more if he did not desire to do so, nor could he be cross examined as to matters not covered by direct testimony, but in passing upon the evidence in

this case for the purpose of finding the facts, you have a right to take this omission of the defendant into consideration."

The Supreme Court, in approving the instruction in the Caminetti case, said (242 U. S. 470-494):

> "When he took the witness stand in his own behalf, he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regard it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters which might incriminate him." * * *
>
> "We agree with the Circuit Court of Appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf."

The trial court might well have gone farther and remarked upon the failure of Mr. Butchart to explain why he displaced his sales manager for soliciting business in Washington, or his failure to explain what it was that Hollister had been doing that he "should not do," or his failure to explain why the Oregon company avoided quoting on cement inquiries from Washington, or his failure to explain how he launched a new cement factory concurrently with the withdrawal of the Washington companies from the Oregon market, or why the price of cement did not recede on the advent of the new product. It is so unusual for a manufacturer to regret that some one is trying to sell his product when he is on the eve of starting his factory, that it would at least have been interesting

to hear Mr. Butchart's reason why it caused him regret to learn that Hollister had been soliciting business for him in Washington.

Clark M. Moore.

It is argued that as to Clark M. Moore "there is absolutely no evidence tending to show that at any time he knew of any alleged combination or agreement."

The jury found that there was such a combination; and there was ample evidence on which to base such a finding. The question here is whether there was sufficient evidence to justify the verdict against Clark Moore.

The general situation of the Oregon company at the time when Clark Moore became sales manager has been pointed out. So far as is possible, we will avoid repetition.

The case against Clark Moore is this: He was brought in from Denver as sales manager to displace a former sales manager who had been dismissed for failing to observe the territorial limits that had been fixed; he came from Denver to Portland by way of San Francisco at the invitation of California cement makers to confer with them; he knew of the understanding that the Washington companies were to stay out of Oregon; when he reached Portland he was told of the combination in detail by Aman Moore; and with such knowledge, he conducted the sales of the Oregon company in conformity with the understanding existing among the cement makers, refusing to quote in Washington, and observing the agreement as to price. We will now refer to the record supporting these statements.

That he knew he was taking the place of a deposed

sales manager who was dismissed for failure to observe the agreement, see Trans. 161-162, where Aman Moore testified:

> "We also discussed the removal of Mr. Hollister from the sales department and Mr. Butchart's direction about it because Mr. Hollister had been soliciting business for our company in the state of Washington. We discussed the whole situation and everything pertaining to the combine, the matters of these inquiries, and especially those about the territory which we were not supposed to ship or quote."

His coming by way of San Francisco to confer with California cement makers at their invitation is shown by his own letter (Trans. P. 676) in which he said:

> "I am going to Portland, Oregon, via San Francisco, where I will see our friends, and I am very much pleased to have received letters since I saw you, from Mr. Erlin, of the Pacific Portland Cement Co., and Mr. Muhs, of the Santa Cruz Co., asking if it would not be possible for me to go to Portland via San Francisco, so as to discuss matters of interest * * *."

That he knew of the understanding that the Washington companies were to stay out of Oregon, see his own letter (Ex. 138, Trans. P. 664) of April 27, 1916, to Hollister, in which he said:

> "Regarding the Washington and Olympia Portland cement companies selling cement in Portland again on a temporary arrangement, would say for your information, it is my understanding that they have some contracts they are completing * * *."

We have already referred to the record (Trans.

161-162) that Aman Moore told him about the combination on his arrival at Portland.

That he carried out the purpose of the combination as sales manager of the Oregon company, is shown by the following:

Aman Moore had received over one hundred replies to his circular letter to the cement trade. Among them were the inquiries from Washington. These were turned over to Clark Moore when the latter became sales manager.

The policy of Sales Manager Clark Moore toward Washington inquiries is disclosed in these letters:

> To Auburn, Washington: "We have been unable to obtain satisfactory freight rates into your territory. We doubt very much whether we will be able to quote attractive prices to you * * * (Memo for Mr. Moore) Auburn between Tacoma and Seattle. May be friends of Washington plants after data. Hollister." (Trans. P. 669).
>
> To Chehalis, Washington: "We thank you for your letter of June 7th, regarding your handling our cement, and would say that it is not our intention to establish any jobbing agencies anywhere." (Trans. P. 669.)

In connection with the Chehalis letter it should be noted (Trans. P. 670) that the Chehalis dealer said nothing about a jobbing agency, but had asked for a quotation on 500 barrels of cement, f. o. b. Raymond, Washington, and for a price on carload lots at Chehalis.

> To Aberdeen: "Your telegram of June 13th did not reach this office until today (16th), having evidently been delayed at Oswego, and consequently we know we are too late to give you

a price on the 3,000 barrels of cement you asked for * * *. (Trans. P. 671; Ex. 147.)

To Centralia: "We regret very much at this time we are unable to quote you on cement. The rate question in your territory has not been settled, and until same is adjusted, nothing can be done." (Trans. P. 672; Ex. 148.)

When a Seattle concern asked for a figure on 5,000 barrels, (Trans. P. 594) defendant Clark Moore in person telephoned to Eden at Seattle (Trans. pp. 127, 131) to learn the price being quoted by the Washington cement makers; and thereupon quoted (Trans. P. 594) a higher price than the Washington makers were asking, (Trans. P. 595) and a price higher than the Oregon company was getting at Portland. The Portland price was $2.30. Freight to Seattle was 8½c per hundred (Trans. P. 630), or 34c per barrel. A price of $2.68 f. o. b. Seattle, therefore, was $2.34 at Portland.

The excuses given about freight rates were a shallow subterfuge, because as early as December 31, 1915, (Trans. P. 630) freight rates had been arranged by Aman Moore (Trans. P. 173) long before Clark Moore succeeded him as sales manager.

Further, after so actively avoiding any Washington business, when Clark Moore received the telegram of August 29, 1916, from his brother, as follows: (Trans. 547; Ex. 134)

"Bitter complaint in directors' meeting because we do not sell in Vancouver; lawyers also kick to beat the band; don't you think it best to establish agency there? Do not see how we can get around it with things going the way they are. I advise it."

Then, and only then, did Clark Moore make an effort to secure business in Washington.

We believe this record was sufficient to justify the court in submitting to the jury the question whether Clark Moore became a party to the unlawful combination and carried it into effect.

It is argued that it was erroneous for the court to charge the jury that it might consider the relationship of defendant Butchart to the Portland cement company, prior to the organization of the Oregon Portland Cement Company, and his activities in connection with the Oswego plant under both these corporations.

The thing under observation was the development of a cement factory at Oswego, Oregon, and its relation to the existing cement combination. Butchart was interested in both corporations. Both corporations had the common purpose of completing the Oswego plant. The first failed; the second succeeded it, and made a success of the Oswego project.

The story of the defendants' connection with the cement combine, and with the Oswego plant can not be told nor understood without including what was done in 1914 and 1915 when the first corporation, the Portland Cement Company was in existence. The history of the thing shows the active interest of defendant Butchart in the Oswego plant under both corporations.

Counsel say in their brief that "the jury was instructed by the trial court that they might find the defendant Butchart guilty upon the letters alone without any proof that he actually entered into any agreement or combination, or conspired with the other defendants, or any of them." Counsel undoubtedly intend this as argument, and not as a statement

of fact; because no such instruction as this was given. On the contrary the jury were told that the defendants could not be convicted unless they found there was a restraint of trade or monopoly as a "result of a previous agreement or tacit understanding between the parties charged, and the defendants on trial were or became parties to such combination." (Trans. P. 470.)

We believe we have discussed all the specifications which have been argued in the brief. Many other errors were assigend, but have not been argued. We have not discussed them, because we do not know what counsel claim for them.

It is confidently believed that an examination of the record will show that there was no prejudicial error; and that the judgment of conviction ought to be affirmed.

Respectfully submitted,
JOHN S. COKE,
United States Attorney for Oregon.
LESTER W. HUMPHREYS,
Special Assistant United States
Attorney for Oregon.

UNITED STATES OF AMERICA, ss.
DISTRICT OF OREGON

Due legal and timely service of the within Brief is hereby admitted and accepted within the State and District of Oregon, on the 15th day of September, 1923, by receiving a copy thereof duly certified to as a true and correct copy of the original by Thos. H. Maguire, Assistant United States Attorney for the District of Oregon.

A. B .WINFREE,
Attorney for Plaintiffs in Error.

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